

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Crime and Corruption Commission v Acting Deputy Commissioner Wright & Anor (No. 2)* [2021] QCAT 304

PARTIES: **CRIME AND CORRUPTION COMMISSION**
(applicant)

v

ACTING DEPUTY COMMISSIONER D A (TONY) WRIGHT

CONSTABLE KAI STEVEN WALLER
(respondents)

APPLICATION NO/S: OCR344-19

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 1 September 2021

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Kanowski

ORDERS:

- 1. The disciplinary decision made by Acting Deputy Commissioner Wright on 26 September 2019 is confirmed.**
- 2. The non-publication order made by the tribunal on 25 March 2020 is ended.**
- 3. Publication of information that may identify a person referred to in the filed documents who is not a police officer and who is not identified in the reasons for decision is prohibited, except to the parties and their representatives and to any tribunal or court dealing with any appeal against the tribunal's decisions in this matter.**

CATCHWORDS: POLICE – INTERNAL ADMINISTRATION – DISCIPLINE AND DISMISSAL FOR MISCONDUCT – QUEENSLAND – where Crime and Corruption Commission seeks review of sanction decision made by police in respect of misconduct – whether dismissal the only appropriate sanction

Police Service Administration Act 1990 (Qld), s 7.1
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 66

Aldrich v Ross [2000] QCA 501

Re Bowen [1996] 2 Qd R 8
Crime and Corruption Commission v Acting Deputy Commissioner Barron & Anor [2015] QCAT 96
Crime and Corruption Commission v Acting Deputy Commissioner Wright & Anor [2021] QCAT 18
DLB v Commission for Children and Young People and Child Guardian [2012] QCAT 403
Legal Services Commissioner v Keliher [2021] QCAT 211

APPEARANCES & REPRESENTATION:

Applicant: Z Valeska, Principal Lawyer, Crime and Corruption Commission

First Respondent: M O'Brien and I Fraser, senior legal officers, Queensland Police Service

Second Respondent: B I McMillan, instructed by Gilshenan & Luton Legal Practice

This matter was heard and determined on the papers pursuant to section 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act')

REASONS FOR DECISION

Introduction

- [1] The Crime and Corruption Commission ('CCC') has applied for a review of the disciplinary sanction imposed on Constable Waller for misconduct. On 26 September 2019 Acting Deputy Commissioner Wright imposed the following sanction, in summary:
- (a) reduction in salary from constable pay-point 1.5 to constable pay-point 1.3;
 - (b) a requirement to participate in the first-year constable program, and upon successful completion of the program to return to pay-point 1.5;
 - (c) transfer from Roma to Ipswich for supervision in the program; and
 - (d) a requirement to report to an Assistant Commissioner in the Ipswich region to discuss the expectations the Queensland Police Service has of Constable Waller as a member of that service.
- [2] A single 'matter' of misconduct had been alleged against Constable Waller. It alleged improper conduct between 1 November 2016 and 19 December 2017, when Constable Waller was stationed in Roma. Part of the misconduct involved interactions with a woman referred to here as NFT. The following particulars of misconduct have not been disputed by Constable Waller.
- [3] First, he provided access to his QLITE device to other police at Roma, without authorisation. A QLITE device is an iPad used to access confidential databases such as the police database QPRIME and Queensland Transport's vehicle registration database. Each device is issued to a particular officer for their exclusive use. This misconduct occurred on various dates across the period in question.

- [4] The second to fourth particulars involve an incident that happened late one night shortly before Christmas in 2016. Constable Waller was on solo patrol.
- [5] The second particular of misconduct is that in performing his official duties, Constable Waller used a police vehicle to transport members of the public for an unauthorised purpose. This involved giving NFT and a male companion a lift to their homes, after Constable Waller saw them walking homeward from the town centre.
- [6] The third particular is that while on duty, Constable Waller engaged in sexual intercourse with NFT. This occurred after he dropped the male companion home, and then drove NFT to her home. The sex occurred on a verandah of NFT's home.
- [7] The fourth particular is that Constable Waller failed to adequately secure his service firearm and accoutrements while on duty. Before having sex with NFT, he removed his trousers and his utility belt which held his firearm, ammunition and taser, and left them nearby.
- [8] The fifth particular is that he failed to conduct a random breath test on NFT while performing random breath testing duties on 18 March 2017.
- [9] There were two additional particulars of misconduct alleged against Constable Waller in the police disciplinary proceeding, which he did dispute. The Acting Deputy Commissioner was not satisfied that they were established. The CCC sought a review by the tribunal in respect of one of those two particulars. In *Crime and Corruption Commission v Acting Deputy Commissioner Wright & Anor*,¹ the tribunal confirmed the Acting Deputy Commissioner's decision in that regard.
- [10] Accordingly, the unsubstantiated particulars are not taken into account by me in the present phase of the review proceeding relating to sanction.
- [11] The CCC's position is that the tribunal should set aside the existing sanction decision, and substitute a decision to dismiss Constable Waller from the police service. Constable Waller's position is that the tribunal should confirm the existing sanction decision. The Acting Deputy Commissioner has adopted a neutral position in the review.

Documents

- [12] The evidence before the tribunal consists of that noted in *Crime and Corruption Commission v Acting Deputy Commissioner Wright & Anor*,² together with the affidavit of Constable Waller dated 18 February 2021. The affidavit was allowed as new evidence.³ The parties have filed written submissions on sanction, and on whether the earlier confidentiality order should be continued.

Disciplinary framework

- [13] 'Misconduct' means conduct that:
- (a) is disgraceful, improper or unbecoming an officer; or
 - (b) shows unfitness to be or continue as an officer; or

¹ [2021] QCAT 18.

² Ibid, [10].

³ See tribunal directions dated 11 March 2021.

- (c) does not meet the standard of conduct the community reasonably expects of a police officer.⁴
- [14] The main purposes of the disciplinary part of the Police Service Administration Act are:
- (a) to provide for a system of guiding, correcting, rehabilitating and, if necessary, disciplining officers; and
 - (b) to ensure appropriate standards of discipline are maintained within the service to—
 - (i) protect the public; and
 - (ii) uphold ethical standards within the service; and
 - (iii) promote and maintain public confidence, and officers' confidence, in the service.⁵
- [15] Related principles drawn from the observations of courts and tribunals include that:
- (a) disciplinary proceedings are not punitive in character, but sanctions must be 'adequate to signify the public disapproval of the conduct and deter the officer and others from similar future conduct';⁶
 - (b) disciplinary proceedings should serve to protect the reputation of the police service;⁷ and
 - (c) they should maintain confidence that powers are not being abused and that officers are performing their duties with integrity.⁸
- [16] The tribunal must conduct a fresh hearing on the merits, to produce the correct and preferable decision.⁹
- [17] As was observed in *Aldrich v Ross*,¹⁰ it is proper in a police disciplinary matter to afford considerable respect to the views of the original decision-maker on sanction. This is because the original decision-maker will have 'particular expertise in the managerial requirements of the police force'.¹¹ Further:
- ... the Commissioners of the Police Service ... have the important and difficult task of managing a large institution whose officers play an important part in society and who are given substantial powers and responsibilities for their task. They must be kept honest, efficient and conscientious. The Misconduct Tribunals do not have particular experience in managing the Police Service.¹²

⁴ *Police Service Administration Act* 1990 (Qld), s 1.4 (definition of 'misconduct'), ('Police Service Administration Act').

⁵ *Ibid*, s 7.1.

⁶ *Crime and Corruption Commission v Acting Deputy Commissioner Barron & Anor* [2015] QCAT 96, [78].

⁷ *Re Bowen* [1996] 2 Qd R 8, 9.

⁸ *Ibid*, 10.

⁹ *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 20.

¹⁰ [2000] QCA 501.

¹¹ *Ibid*, [43].

¹² *Ibid*, [26] (quoting observations of the judge below).

- [18] The tribunal, however, brings a ‘public point of view’.¹³ After affording due respect to the views of the original decision-maker, the tribunal must reach its own decision on what constitutes the correct and preferable decision.
- [19] Available disciplinary sanctions include dismissal, demotion (whether permanently or for a stated period), and probation.¹⁴

Nature and seriousness of the misconduct

- [20] The first aspect of Constable Waller’s misconduct, involving allowing other officers to use his QLITE device, occurred on numerous dates over a period of approximately a year. The sharing of the device was contrary to the requirement that a device was to be used exclusively by the officer to whom it had been issued. As is apparent from *Crime and Corruption Commission v Acting Deputy Commissioner Wright & Anor*,¹⁵ a breach of this requirement can make it difficult or impossible to determine who is accessing confidential information.
- [21] As discussed in that case, the sharing of devices was a widespread practice at Roma station at the time.¹⁶ This was not for any sinister purpose. There were few devices available at that stage of the device rollout. Officers found them to be a very useful policing tool and so shared them.
- [22] Even though this aspect of the conduct was prolonged, it does not in itself warrant a heavy sanction, in my view. Sharing of devices was accepted practice at the station, for the perceived greater good, notwithstanding the prohibition. While I do not have details of any action taken against colleagues of Constable Waller, it has not been suggested that any of them suffered any significant sanction.
- [23] The second to fourth aspects involve three types of misconduct on one night, shortly before Christmas in 2016. They involved the unauthorised lift, the sex while on duty, and the removal of the utility belt with the firearm etc.
- [24] It is hardly necessary to say that Constable Waller should have been performing policing work while on duty, instead of giving people lifts and engaging in sex. Further, firearms and associated items should not be cast aside. It is relevant to note, though, that the intercourse was occurring in a secluded place. It is not suggested that there was a likelihood of anyone venturing on to the verandah. The actual risk of harm was minimal, in my view.
- [25] According to an unsigned statement, NFT told investigators that she was intoxicated but the sex was consensual. The CCC’s submissions describe Constable Waller as preying upon NFT.¹⁷ That characterisation, though, is somewhat at odds with NFT’s description of a consensual act, and with a text message she exchanged with Constable Waller in March 2017. In that message, she said they would have to catch up again soon, and added a smiley-face emoji.
- [26] Constable Waller’s conduct on the night in December 2016 was improper. It involved poor judgment and unbecoming conduct. However, it is not so serious as to warrant consideration of dismissal, in my view.

¹³ *Aldrich v Ross* [2000] QCA 501, [43].

¹⁴ Police Service Administration Act, s 7.34.

¹⁵ [2021] QCAT 18.

¹⁶ *Ibid*, [34] – [51].

¹⁷ CCC submissions dated 3 April 2020, [53(b)].

- [27] The most serious aspect of misconduct involved the random breath testing incident in March 2017. It does give rise to legitimate questions about whether Constable Waller has the character required to be a police officer, and whether he ought to be dismissed from the police service.
- [28] NFT told investigators that she had finished work at 12.45 am. She then had a few drinks but did not get intoxicated because she knew she had to collect her children in the morning. When she was driving to collect the children at about 8.30 am, she was stopped by Constable Waller. He was holding an alcometer. They had a brief conversation and he let her continue, without testing her.
- [29] In a text message exchange later that day between Constable Waller and NFT, he said that she had looked like she did not want to be awake that morning. She responded in agreement, and added that a Mack truck had definitely run over her head. Constable Waller replied: 'Lol that's why I didn't breath test u just in case', followed by a grinning-face emoji and a thumbs-up emoji.¹⁸
- [30] During this exchange, both Constable Waller and NFT went on to express interest in 'catching-up' again. It is apparent from the context that they were referring to the prospect of a further sexual encounter. There were similar expressions of interest by Constable Waller in messages on other dates, before and after this occasion.
- [31] Constable Waller was required to participate in a 'directed interview' in the course of the investigation. When asked about the random breath testing incident, he said that his intention had been to conduct a random breath test and licence check. However, NFT said she was running late to pick up her children. He said he did not want to delay her, and so he let her go without a breath test. He told investigators that NFT had looked tired but she did not have indicia of intoxication such as slurred speech, red eyes or the smell of alcohol. Investigators asked how his decision not to test her would be perceived (presumably by the community). Constable Waller said it 'looks bad if I'm ... obviously favouritising one person over another person'.¹⁹ He acknowledged that if she had been over the limit, especially with children in the car once she collected them, there would be 'a high risk of, you know, it could be something serious'.²⁰

Constable Waller's background and service history

- [32] The summary below is drawn mainly from Constable Waller's written submissions to the Acting Deputy Commissioner in September 2019, and his affidavit dated 18 February 2021.
- [33] Constable Waller was born in 1990. He is currently 29. At the time of the conduct in question, in 2016 and 2017, he was 26.
- [34] In 2012, he had graduated with a bachelor's degree in sport and physical education. He was employed as a teacher in 2013 and 2014. He then trained as a police officer. In April 2015 he was sworn in. At his graduation, he was presented with the Commissioner's award:

¹⁸ Exhibit 1, Tab B, 37.

¹⁹ Exhibit 1, Tab B, 1026.

²⁰ Ibid.

For highest achievement founded on individual conduct, leadership qualities, skills performance, academic results and commitment to the ideal principles of service to the community.²¹

- [35] He was also presented with the Constable Sondra Lena award.
- [36] He then undertook the first-year constable program in Atherton. In May 2016 he was transferred to Roma. Constable Waller describes his experience in Atherton positively: there was good supervision and he would work with a partner. He says his experience in Roma was initially good, but it then declined from mid-2016. He attributes this to a lack of leadership after the officer-in-charge took extended leave. Constable Waller says staff turnover was high; he was often required to do solo patrols; and he often had to be shift supervisor despite his junior status. There was a feeling of instability at the station. It was difficult to get into training courses. He felt his progress was stalled.
- [37] The investigation by police into possible misconduct by Constable Waller began after information was received from the public. After the investigation, he was stood down pending the disciplinary decision, from December 2017. During the stand-down period of almost two years, he remained in Roma performing administrative duties within the police service. He says he felt socially isolated, as his peers had formed his social network. There was a financial impact because he was unable to earn additional amounts through overtime, night shifts or relieving. He received treatment for anxiety and depression. He provided a September 2019 medical certificate by Dr Barbara Vandeleur indicating that she had been treating him for anxiety and depression since January 2018.
- [38] Constable Waller is married with children. He says that he and his wife had relationship difficulties from late 2015. These escalated when his wife felt isolated in Roma. She moved to Brisbane with the children in December 2016. She and Constable Waller had reconciled by the time he wrote his submissions in September 2019. The disciplinary process caused much anxiety for his wife. It put a strain on their relationship.
- [39] As required by the Acting Deputy Commissioner's decision, Constable Waller has again completed the first-year constable program. He says this involved close supervision. He also became involved in a school adopt-a-cop program, as he had been in Roma. He has applied to enter the police negotiator's course.
- [40] Constable Waller attended the required meeting with the Assistant Commissioner. He says this was very confronting and it has made a lasting impression.
- [41] Constable Waller says the financial impact of the Acting Deputy Commissioner's decision was an income loss of almost \$11,000 over a period of 399 days. Further, there will be some ongoing financial impact, if he is permitted to remain in the service, because his pay-point progression has been put 12 months behind what it would otherwise have been.
- [42] There are a number of references.
- [43] One is from Sergeant Leslie Ferry, who had been Constable Waller's supervisor in Roma. Sergeant Ferry speaks of professionalism and skill in Constable Waller's

²¹ Exhibit 1, Tab A, 62.

performance of his duties, and then of commitment to new duties during the stand-down period. Sergeant Ferry says he was surprised to learn of the misconduct allegations, believing such conduct to be out of character.

- [44] A more recent reference is from Sergeant Jacqueline Nunn who was Constable Waller's team leader when he transferred to Ipswich. She describes positive attributes such as patience, compassion, integrity, and excellent communication skills.
- [45] Senior Sergeant Liz Burns-Hutchison was Constable Waller's supervisor in the first-year constable program at Ipswich. She was aware of the misconduct Constable Waller had committed in Roma, and believes that Constable Waller has true remorse. She makes favourable comments about Constable Waller's performance.
- [46] Kate Van Der Meulen, head of senior campus at Roma State College, says she has known Constable Waller both as a teacher and a police officer. She says he worked closely with the school in its adopt-a-cop and other programs. She comments positively on his commitment and other attributes.
- [47] Constable Waller has also provided correspondence in which he has been given positive feedback by supervisors, colleagues, outside agencies, and members of the public. These include feedback from hospital staff in 2015 that Constable Waller, then a recruit, had shown care and compassion when assisting with a severely disabled patient. He had shown 'excellent rapport and communication with a very difficult patient' and assisted a nurse 'with the agitated patient during a rather messy toilet visit'.²² More recent feedback from Ipswich concerns Constable Waller's effective communication with an arrested person known to be antagonistic toward police generally, and with a highly volatile person who was initially highly resistant to receiving medical treatment. An Ipswich resident who had been involved in a traffic accident thanked Constable Waller and his colleague for their courtesy and assistance.

What is the correct and preferable sanction?

- [48] The CCC submits that the only appropriate sanction is dismissal. It submits that the Acting Deputy Commissioner placed too much weight on factors pressed by Constable Waller as mitigating. Constable Waller's misconduct, the CCC submits, demonstrates that he is unfit to be a police officer. He has displayed a 'predilection for favouring his own interests over the interests of the public'.²³ His misconduct was not a single, isolated act. It took various forms, over a period.
- [49] The CCC describes Constable Waller's decision to allow NFT to continue to drive 'whilst possibly under the influence of alcohol' and on her way to collect her children as 'incomprehensible, given the real risk of accident and injury'.²⁴ In my view, this is overstated. The available information does not suggest much likelihood that NFT was over the limit. The more troubling feature of the incident, in my view, is that Constable Waller treated an associate more favourably than he would have treated a stranger. NFT was spared the risk of a possibly incriminating result from a breath test. She reportedly said she was running late to collect her children, but it is

²² Exhibit 1, Tab A, 69.

²³ CCC's submissions dated 3 April 2020, [23].

²⁴ Ibid, [53].

unlikely that such comments by a stranger would have caused Constable Waller to dispense with a breath test.

- [50] The community expects police officers to carry out their duties conscientiously, without favouring their family, friends, lovers, or other associates. Constable Waller's failure to perform his duties impartially on the occasion in question erodes the confidence that the community can place in him. He was willing to favour an associate on that occasion: might he do so again, or even turn a blind eye to criminal conduct committed by an associate? The other misconduct adds to the impression of untrustworthiness. The stain on his character detracts from his credibility as an authority figure or a witness.
- [51] On the other hand, the decision to let NFT continue on her way was a quick one that may have seemed harmless at the time. It was not pre-meditated, or calculated to enable criminal conduct.
- [52] The evidence from referees and others suggests that ordinarily Constable Waller performs his duties diligently and impressively. Some of this evidence relates to conduct while the tribunal review proceedings have been on foot (since October 2019), and it should be borne in mind that Constable Waller will have had motivation to be on his best behaviour in an effort to save his career. However, the observations are similar to ones that were made about Constable Waller's earlier behaviour, and so I do not regard his recent behaviour as unrepresentative of his usual conduct.
- [53] The CCC submits that Constable Waller has made 'repeated attempts to minimise his involvement',²⁵ and that this undermines claimed remorse and insight. In this regard, the CCC submits, for example, that Constable Waller has attempted to blame instability at the Roma police station for his 'inability to assess the correctness'²⁶ of his actions. He has attributed his misconduct, the CCC contends, to external factors such as his marital difficulties. The CCC argues that Constable Waller in his directed interview made unfounded efforts to portray himself as trying to protect NFT in giving her a lift, and that he attempted to 'assign the bulk of the responsibility for the sexual encounter to [NFT]'.²⁷ It submits that Constable Waller in the directed interview 'attempted to cover up the seriousness of the situation'²⁸ relating to the random breath testing incident.
- [54] I do not accept the suggestion that Constable Waller was unable to assess whether his conduct was appropriate, or the submission that he made attempts to minimise or cover up his involvement. He made immediate admissions in the directed interview to the wrongdoing in question. For example, in relation to the random breath testing incident, his immediate response was that NFT had said she was running late to collect her children, so he let her go without a breath test. There is no evidence from NFT to refute that there was a conversation about her running late to collect her children. Constable Waller in the directed interview went on to say that he did not recall having a subsequent communication with NFT about the intercept. That may be true, given that the directed interview occurred nine months after the incident, and the text message exchange in question was only one of many. The investigators

²⁵ CCC's submissions dated 3 April 2020, [55].

²⁶ Ibid, [53(c)].

²⁷ Ibid, [53,b)].

²⁸ Ibid, [94].

then quoted from the text messages. Constable Waller did not deny their content, but he insisted that his belief had been that NFT was not affected by alcohol. That is not a patently false claim, in my view. There are traces of prevarication in one or two of his responses, but overall I do not see how his account amounts to an attempted cover-up.

- [55] In relation to the earlier occasion when the sex occurred, Constable Waller made immediate admissions when questioned about it in his directed interview. It was only in prolonged follow-up questioning during that interview that some answers emerged which, viewed in isolation, might be regarded as deflecting responsibility. In context, they do not seriously detract from the admissions of wrongdoing.
- [56] Similarly, the fact that an officer facing the prospect of dismissal speaks of difficulties in the workplace or in the officer's personal life does not necessarily amount to blame-shifting. It can be consistent, as it is here in my view, with an officer explaining that external factors have contributed to their willingness to engage in misconduct. Constable Waller has not argued that those factors render him blameless. He has simply advanced them as relevant factors to be considered in the exercise of the discretion about sanction.
- [57] Constable Waller's lawyers have made submissions about the delay between the investigation and the Acting Deputy Commissioner's decision. However, I do not propose to discuss those submissions because I do not see delay as an influential consideration in this case. Delay is regrettable but it is inevitable in less urgent matters being dealt with by the police or the tribunal.
- [58] Constable Waller's misconduct involving the sharing of the QLITE device was well-intentioned but improper. The misconduct on the night in late 2016 was foolish and unbecoming. The more serious misconduct involved the random breath testing. That conduct was clearly improper, albeit momentary and not premeditated. It reflects negatively on Constable Waller's character and integrity.
- [59] I accept that the marital and workplace difficulties that Constable Waller experienced in 2016 and 2017 lowered his morale, and may have resulted in him engaging in conduct that he otherwise would have avoided. Further, the Acting Deputy Commissioner commented in his statement of reasons:
- ... it was less than optimal for you to perform single officer patrols, particularly at night, which has placed you in a position of trust in terms of greater autonomy in the way you perform your functions at a very early stage of your career.²⁹
- [60] However, I do not regard those factors as particularly significant when assessing Constable Waller's fitness to be a police officer. Police officers are rightly expected to act ethically and responsibly even if circumstances are challenging or suboptimal.
- [61] Weight should, though, be placed on the indications that Constable Waller ordinarily engages in appropriate and even commendable conduct as a police officer. This is evidenced by the awards he has received and the very favourable comments, both solicited and unsolicited, from varied sources.

²⁹ Exhibit 1, Tab A, 88.

- [62] Overall, the evidence does not lead me to the conclusion that Constable Waller has such a flawed character that he is incapable of acting ethically or is disinclined to do so. His motivation for ethical conduct must surely have been boosted considerably by the salutary experience of being investigated and disciplined. I consider it likely, if he remains a police officer, that he will act ethically and not corruptly.
- [63] It is also relevant to bear in mind that Constable Waller was relatively young and inexperienced, and at a junior rank, at the time of the misconduct.
- [64] I place weight on the view of the Acting Deputy Commissioner as to the appropriate disciplinary response. I must also bring a public perspective. That is not a straightforward task, because views within the community would differ on how much latitude, if any, should be shown to officers who have engaged in misconduct. Most members of the community would agree that there should be little tolerance for police conduct that displays favouritism or which could imperil safety. However, they would also agree that each case should be considered on its merits, taking into account factors such as the extent of wrongdoing, the reasons for it, and the officer's other conduct. The predominant community view, I think, would be that misconduct of the type involved in the present case, by a relatively new officer with an otherwise good record, is not so serious as to render that person permanently unfit to serve as a police officer.
- [65] Accordingly, I do not accept the CCC's submission that the only appropriate sanction is dismissal.
- [66] The CCC has cited a number of previous decisions involving officers engaging in sex or giving unauthorised lifts and so on. While those cases have been generally instructive, I do not propose to discuss them because none involves circumstances close enough to those of this case to provide any sort of benchmark. Much turns in each case, of course, on factors such as the gravity, nature and duration of misconduct, and whether it was planned or spontaneous, as well as seniority, length of service, past good conduct, and remorse.
- [67] The sanction imposed by the Acting Deputy Commissioner does sufficiently and appropriately give effect to the statutory purposes of disciplinary action. It denounces the misconduct. It deters future misconduct both by that denunciation and by the financial impact. The investigatory and disciplinary process itself has had a salutary effect. The sanction involves guidance and supervision. It is sufficient to maintain public and collegial confidence in the police service because it shows that serious lapses from required standards will have significant consequences.
- [68] Where the purposes of the disciplinary process are adequately met by a sanction less severe than dismissal, that sanction is preferable to dismissal. This is because of the impact of dismissal on the individual and the wasted investment by the police service in training and developing an officer.
- [69] The correct and preferable decision on sanction is the decision that was made by the Acting Deputy Commissioner. Accordingly, I will confirm that decision.

Non-publication order

- [70] Proceedings in the tribunal and reasons for decision are open to the public unless subject to a non-publication order or some statutory restraint.³⁰ The tribunal may make a non-publication order only if it considers that such an order is necessary for certain reasons, such as to avoid the publication of confidential information or information whose publication would be contrary to the public interest, or for some other reason in the interests of justice.³¹
- [71] On 25 March 2020 Senior Member Aughterson made an order, until further order, prohibiting publication of information to the extent that it could identify or lead to the identification of Constable Waller or ‘any innocent third party’ to the proceeding save as is necessary for the parties to engage in and progress the proceeding. That order has remained in force until now.
- [72] Senior Member Aughterson did not give reasons for the order, but I note that it was made in response to an application by the CCC requesting a non-publication order. The CCC had submitted that publication of NFT’s identity, or that of her friends and relatives mentioned in the documents, would be highly embarrassing to those people. The CCC submitted that identifying particulars about those people in the filed documents was presently confidential, and that it was not in the public interest for that information to be published.
- [73] If it was meant by the CCC that the particulars were confidential by force of law, the basis for any such confidentiality was not explained. In any event, I accept that the identity of those persons in relation to this matter, and the identity of Constable Waller in relation to this matter, have not been in the public domain.
- [74] The CCC sought an order permanently prohibiting publication of the names of the civilians, and an order prohibiting publication of Constable Waller’s name while the review proceeding was before the tribunal.
- [75] In its submissions dated 3 April 2020, the CCC said that the prohibition on publication of the identity of Constable Waller should be removed.
- [76] On 5 May 2021 the tribunal directed the parties to file submissions, or advice that no further submissions were intended, on whether a non-publication order in respect of Constable Waller should be continued.
- [77] The CCC advised that it did not wish to file further submissions on the matter. The Acting Deputy Commissioner advised that he did not oppose the continuation of the non-publication order, but he did not wish to file submissions.
- [78] Mr McMillan for Constable Waller has submitted that the non-publication order should continue. He submits that publication of Constable Waller’s identity would be contrary to the public interest, and not in the interests of justice. He notes that if the CCC’s review of the sanction decision is unsuccessful, the Acting Deputy Commissioner’s decisions on substantiation and sanction will both have been confirmed. Constable Waller will be in the same position as he was before the review proceedings. Constable Waller did not bring the proceedings, and Mr McMillan submits it would not be in the public interest for Constable Waller’s

³⁰ QCAT Act, s 66, s 90(1).

³¹ Ibid, s 66.

identity to be published ‘where the applications for review have been entirely unsuccessful’.³²

- [79] Mr McMillan cites two cases in support of his submissions. One is *VG v Deputy Commissioner Barnett*,³³ where the tribunal had made a non-publication order protecting an officer who had unsuccessfully sought review of a sanction decision. However, I note that the tribunal merely acknowledged the existence of an order that had been made earlier in the proceeding. The tribunal did not disturb that order, but it did not explain why it had been made or why it should be left in place.
- [80] The second case is *DLB v Commissioner for Children and Young People and Child Guardian*,³⁴ where the tribunal prohibited publication of the identity of a person who had successfully challenged a blue card decision. The tribunal explained that it was concerned that the person, who had cleared his name, could have his details revealed to the public.
- [81] Mr McMillan acknowledges that Constable Waller has not cleared his name, but he has been ‘successful in resisting the [CCC’s] applications for external review’.³⁵
- [82] Mr McMillan submits that any non-publication order should apply consistently to all persons involved in the matter: the principles of open justice apply equally, and there is no basis to discriminate between witnesses and parties.
- [83] I am not persuaded by Mr McMillan’s submissions on this topic. In my view, it would be contrary to the interests of justice to allow the publication of the identity of NFT and other civilians mentioned in the papers. Those persons are predominantly her relatives and friends. NFT has not committed any wrongdoing. She is, in this sense, an innocent bystander to the proceeding. It is apparent that she cooperated to some extent at least in the investigation. I say ‘to some extent’ because her statements are not signed. This suggests she must have declined to sign them. However, it can be assumed that she provided the information contained in the statements. Revelation of her identity would be embarrassing for her. The detection and investigation of misconduct by police depends, to some extent, on the cooperation of people like NFT. Their identity, and of those close to them, should therefore be protected.
- [84] Accordingly, I will make a non-publication order that covers all civilians mentioned in the filed documents, except for any identified in these reasons. Dr Vandeleur and Mrs Van Der Meulen have been identified because their input has been in a professional capacity. There are other civilians, unrelated to NFT, mentioned in the filed papers, for example members of the public mentioned in QPRIME printouts because they were stopped in traffic intercepts. Their identity would normally be kept confidential within police records. Some of the information is sensitive, for example criminal histories.
- [85] The prohibition should not extend to other police, as they were involved because of the performance of their official duties. I do not consider that there is any significant sensitivity about their identities, notwithstanding that some of them also engaged in the practice of sharing QLITE devices.

³² Submissions on behalf of Constable Waller dated 14 May 2021, [9].

³³ [2013] QCAT 449.

³⁴ [2012] QCAT 403.

³⁵ Submissions on behalf of Constable Waller dated 14 May 2021, [12].

- [86] So far as Constable Waller is concerned, I appreciate that publication of his identity would be embarrassing and stressful for him and his family. However, proceedings before the tribunal are intended to be public unless a non-publication order is justified. I am not satisfied that such an order is justified. In *Legal Services Commissioner v Keliher*, the tribunal observed that the embarrassment that would flow from publication did not outweigh the interests of public protection that underpinned that disciplinary proceeding.³⁶ The conduct in that case was serious criminal conduct. That is not the case here, but the general principle applies. Police perform a public role and are entrusted with important powers. The public has a legitimate interest in knowing when a police officer has failed to uphold standards.
- [87] I appreciate that it was not Constable Waller who chose to take the matter to the tribunal. If the CCC had not sought review, Constable Waller's misconduct would in all likelihood have remained unknown to the wider public. However, the CCC is entitled by law to seek review of police disciplinary decisions. It is a risk for any officer who engages in misconduct that the matter will end up in a public forum, with the embarrassment which that can entail. Some protection might arguably be justified if a review proceeding was brought capriciously or on flimsy grounds, or merely with the intent of embarrassing an officer. However, that is not the situation here.
- [88] Accordingly, I will make a new non-publication order which continues to protect the civilians, apart from those identified in these reasons, but which does not protect Constable Waller.

Conclusion

- [89] For these reasons, I have decided to confirm the sanction decision of the Acting Deputy Commissioner, to end the existing non-publication order, and to make a new one.

³⁶ [2021] QCAT 211, [57].